

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001**

DATE: September 17, 1997

CASE NO.: 95-INA-397

In the Matter of:

RITE AID CORPORATION,
Employer,

On behalf of:

ZUBIN P. FERZANDI,
Alien.

Before: Burke, Guill, Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

The following decision is based on the record upon which the CO denied the application for certification and the employer's request for review, as contained in the appeal file ("AF"), as well as any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On October 29, 1993, Employer, Rite Aid Corporation, filed an application for labor certification to enable Alien, Zubin P. Ferzandi, to fill the position of "Pharmacist." The requirements of the position were four to five years of college, with a Bachelor of Science degree in pharmacy and the license to practice pharmacy in the State of Pennsylvania.

In a Notice of Findings (NOF) dated August 25, 1994, the CO proposed to deny

certification, finding that five U.S. workers were unlawfully rejected. As Employer successfully rebutted the NOF with respect to four of those applicants, only the findings with regard to the fifth applicant, Patil, will be set forth below. With regard to Patil, and in response to the statements made by Employer in its January 11, 1994, letter regarding its recruitment efforts, the CO questioned Employer's statement that Patil was a former employee who was not capable of performing the duties, who had resigned on October 26, 1986, and who did not like retail. Based on the evidence contained in the file, the CO found no evidence that Patil had ever worked for Employer. The CO found that Employer had failed to show that Patil was rejected for lawful job-related reasons.

Employer submitted rebuttal, consisting of a letter from Employer's District Manager, dated September 21, 1994, and a cover letter from Employer's counsel dated September 27, 1994. According to the District Manager, Patil worked for Employer on a part-time basis from 1980 until October of 1986, when he resigned. While Patil did not disclose this employment on his resume, Employer stated that this was possible because he did not feel that it was of material importance. The District Manager stated that he was Patil's immediate supervisor when he worked for Employer. Patil was not proficient in the retail sales area of pharmacy, was very choosy about work hours, schedules and store locations. Patil did not want to commit himself to a full-time job at that time and was unable to perform the job duties in a satisfactory manner. Numerous complaints were received regarding Patil from customers, and he was asked to resign. According to the District Manager, Patil exhibited poor performance in the job and was unable to handle volumes of people when the store became busy.

In a second NOF dated October 20, 1994, the CO proposed to deny certification because Employer had failed to provide any evidence to substantiate the information stated in his rebuttal concerning Patil's alleged employment and termination with Employer. Employer was advised that it needed to provide documentation to support the fact that the applicant was employed with it and that the District Manager was Patil's immediate supervisor. Employer was also requested to submit evidence of poor performance such as copies of performance appraisals.

The CO also noted that Employer's policy of not rehiring previous employees is a violation of the regulations governing labor certification, and also pointed out that the position at issue is not in retail sales, but in the dispensing of medication in the pharmacy. The fact that Patil did not want to commit to full-time employment during his prior employment with Employer was found to be irrelevant to the current application. The fact that he applied for the full-time position at issue herein was evidence of his willingness to work full-time.

Employer was requested to provide documentation (1) of Patil's alleged employment and termination with Employer from 1980, to 1986; (2) to support the allegation that the District Manager was Patil's immediate supervisor from 1980, to 1986; and (3) of poor performance during 1980, to 1986. Employer was also requested to explain the relevancy of an applicant not committing to full-time employment from 1980, to 1986, and in 1993, showing a willingness to commit to full-time by applying for the job opportunity as advertised.

Counsel for Employer submitted its second rebuttal on November 10, 1994, with a letter from Employer dated November 7, 1994. Counsel for Employer stated that Patil could not perform the duties of the job, and that Employer had searched its records and was unable to find documentation relating to Patil's hiring and firing, which occurred more than eight (8) years prior. Counsel argued that the District Manager's statement was clear, consistent, unequivocal, and should be accepted. Counsel also argued that it is entirely understandable that Patil would not place his employment with Employer on his resume since he was asked to resign. Counsel contended that the burden of proof should be on the CO to produce evidence that Patil was not previously employed by Employer.

In his letter, the District Manager stated that Patil was found not qualified for the position. All records pertaining to former employees going back to 1988, "have been lost or destroyed." He asserts that he is an honest law-abiding citizen who has never made a false statement in any official proceedings, and states again that Patil was employed by Employer from 1980, until 1986, working on a part-time basis. The District Manager reiterates the faults found with Patil, as previously noted, and contends that Patil was unable to perform, in a satisfactory manner, the duties of the job. The District Manager then explains that "a former employee that exhibits this type of performance is not rehired by our organization." Patil exhibited an inability to perform the essential tasks of the job and was not qualified to do the job. Employer also pointed out that the job description did require dispensing medications to the public, and that the fact that Patil previously wanted only part-time work was not used as a basis for rejecting him for the current job.

In a Final Determination dated February 23, 1995, the CO denied certification, finding that the rejection of Patil was not based on lawful job-related reasons. The CO noted that Employer initially stated that Patil was not capable of performing the job, did not like retail and resigned on October 26, 1986. After questioning, Employer stated that the applicant worked for six years and was asked to resign, and gave specific examples of performance problems including being choosy about schedule hours, store locations and commitment to full-time employment in addition to poor performance. Employer was then asked for documentation of poor performance and could provide none.

The CO found that Employer's statements could not be accepted without supporting evidence. The CO found it questionable that after a period of nine years, Employer was able to be so precise in the recollections of this applicant, yet possess no records to document the applicant's employment history and poor performance. The CO also questioned why the applicant would be retained for six years if his performance was so poor that customers complained. The CO noted that the reason Patil may not have been flexible about work hours and store locations was due to the fact that he was a part-time employee. The CO concluded that Employer had failed to establish that Patil was not able, willing, qualified, or available for this job opportunity, and therefore had not adequately documented lawful job-related reasons for rejection of his application.

By letter dated March 30, 1995, Employer requested reconsideration of the denial of

certification, stating that if certification could not be granted, the filing should be considered a request for review. On April 11, 1995, the CO denied the request for reconsideration, as it failed to raise issues which could not have been addressed in the rebuttal. The application was forwarded to the Board of Alien Labor Certification Appeals for review.

DISCUSSION

Employer argues that the destruction of records is within the norm for employers, and citing **Mr. And Mrs. Jeffrey Hines**, 88-INA-510 (Apr. 9, 1990), urges that the statements of Employer's District Manager should be accepted as true statements. In so doing, Employer argues that (1) the surrounding facts and circumstances of the matter indicate that it is possible that Patil did not want to mention his employment with Employer since it was on a part-time and moonlighting basis; (2) the District Manager possessed a direct knowledge of Patil, having been his immediate supervisor; (3) the District Manager has no overriding interest in the successful outcome of the proceeding which would cause him to provide false testimony; (4) the District Manager has zealously attempted to locate qualified U.S. workers; and (5) the information provided by the District Manager has not been contradictory, but rather he used "discretion to outline the shortcomings of the U.S. workers on an as needed basis."

Employer argues that the CO cannot question the credibility of the District Manager regarding his recollection dating back 9 years, as it is entirely possible that a supervisor would recall the termination of the employment of a problem employee, particularly if the employer received several justified complaints from the public.

Employer objects to the CO's "erroneously [concluding] that Employer asserted 6 entire years of poor performance," further finding that even if the statement were true, it was not relevant. Employer argues that it is appropriate to conclude based on the record that the employee was asked to leave for just cause. An employer receiving complaints from the public would be justified in terminating an employee. According to Employer, prior poor performance certainly relates to an applicant's qualifications for a job, and is a lawful job-related reason for rejecting an applicant.

An employer who seeks to hire an alien for a job opening must demonstrate that it has made a good faith effort to fill the position with a U.S. worker. See **H.C. LaMarche Ent., Inc.**, 87-INA-607 (Oct. 27, 1988). Under section 656.21 (b)(7), the employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. **Cathay Carpet Mill, Inc.**, 87-INA-161 (Dec. 7, 1988) (*en banc*). Moreover, the employer must establish by convincing evidence that an applicant whose resume indicates that he or she is qualified is not qualified -- the employer cannot shift the burden to the CO to show that the U.S. worker is qualified. **Fritz Garage**, 88-INA-98 (Aug. 17, 1988) (*en banc*).

In **Culver City Meat Co., Inc.**, 93-INA-546 (Jan. 31, 1995), the Board rejected an employer's claim that the applicant, who was previously employed by the employer, was

unsuitable for the job due to lack of trustworthiness, as employer had failed to document the assertion. The Board found that the employer's assertion that the applicant regularly failed to come to work on time and tended to miss work three days at a time could not be considered a basis for the lawful rejection of a U.S. worker. The instant case is indistinguishable. While Employer herein argues that its statement should be given credence, it has provided no documentation to support any of its allegations regarding this U.S. applicant. It is questionable that Employer could recall the exact date of Patil's resignation in 1986, yet have no documentation or records regarding his employment.

In Employer's challenge to the CO's assumption that Patil performed poorly for six years, Employer states that "it is certainly plausible that a Pharmacist's attitude or treatment of the public could change over time." It is for this very reason that Employer should have afforded Patil an interview, and not summarily dismissed him as not qualified. Rejecting an applicant based on prior observations of the applicant is not an appropriate means of evaluating the applicant for the position at issue herein, particularly when the past observation dates back nine years. *See Fritz R. Kundrun*, 94-INA-240 (Jan. 10, 1996). Even assuming Employer's assertions regarding this applicant were true, as Employer notes, a pharmacist's attitude may change over time. By not affording Patil the opportunity to interview, Employer failed to consider an apparently qualified U.S. applicant. Employer's assertions that Patil did not want to work certain schedules or locations is also not acceptable given that at the time, he was working part-time, and is now applying for a full-time position, an entirely different situation than the one dating back nearly nine years, and relied upon by Employer to reject this applicant.

Patil met the minimum qualifications for the position. Where an applicant appears qualified, employers have a duty to investigate further by interviews or otherwise. *See Gorchev & Gorchev*, 89-INA-118 (Nov. 29, 1990). As the applicant appears to have been qualified, and was rejected without the benefit of an interview, Employer's recruitment was not conducted in good faith. Labor certification, therefor, was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will

become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.